

Zhu (Migration) [2018] AATA 4441 (20 September 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Caiyi Zhu

CASE NUMBER: 1702738

DIBP REFERENCE(S): BCC2015/2576637

MEMBER: Margie Bourke

DATE: 20 September 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations.

Statement made on 20 September 2018 at 12:34pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) visa – genuine relationship – live together in Sponsor’s unit – daily expenses paid out of joint account – joint responsibility for household activities – family members come for meals – sponsor willing to move countries if visa not granted – decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 3 February 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 4 September 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied there was sufficient evidence to demonstrate the applicant was the spouse of the sponsor at the time of application.
4. The applicant appeared before the tribunal on 20 September 2018 to give evidence and present arguments. The tribunal also received oral evidence from the applicant's husband, the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The main issue in the present case is whether the applicant is the spouse of the sponsor at the time of application and at the time of decision.

SPOUSE/DE FACTO (cl.820.211(2)(a), cl.820.221)

Whether the parties are in a spouse or de facto relationship

7. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the sponsor's certificate of Australian citizenship dated 12 April 1976, I am satisfied the sponsor is an Australian citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. Based on the registered Victorian marriage certificate, I am satisfied that the parties were married in Melbourne on 13 July 2015. I am satisfied that both parties were legally divorced at the time of the marriage. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

10. I have considered the evidence provided to the Department, the contents of the Department's decision record dated 3 February 2017, the additional evidence provided to the tribunal, the written submissions provided to the tribunal and the oral evidence at the hearing on 20 September 2018.

11. The financial aspects of the relationship

12. I accept that at the time of application the sponsor was retired and in receipt of a pension. I accept that the applicant has obtained employment on a part-time basis, and I accept that initially she found employment hard to obtain but is now employed in a position for which she is suitably qualified and that she enjoys.
13. I accept that the parties moved in together at the sponsor's Department of Housing home which is a rented unit on 20 March 2015. I accept that the parties have always resided at the same premises. I accept that the parties have developed a vegetable garden at these premises.
14. I accept that at the time of application the parties had their own individual bank accounts. I accept that at the time of application the rent and utility expenses were paid out of the sponsor's pension account and other expenses were paid out of the applicant's account. I accept that the parties have since closed their personal accounts and opened a joint account. I accept that the sponsor's pension and the applicant's earnings go into the joint account, and the rent and utility expenses and all daily and household expenses are paid out of this joint account.
15. I accept that the parties do not jointly own real estate or other major assets. I accept that the parties do not have joint liabilities or any debt. I accept that neither of the parties has responsibility for a legal obligation for the other. I accept that the parties pool their financial resources together and they share the day-to-day household expenses.
16. The evidence of the financial aspects of the relationship indicates that the parties are in a genuine and continuing relationship, both at the time of application and at the time of decision.

17. The nature of the household

18. I accept as stated above that the parties have always resided at the same unit and have developed a vegetable garden at these premises. I accept that the applicant is responsible for the vegetable garden, and the sponsor does the cooking and cleans the house. I accept that the parties have family members around for meals at the unit.

19. I accept that both the applicant and the sponsor have one adult son from a previous relationship. I accept that the applicant's son is studying in Australia but lives independently. I accept the applicant provides him with some financial support when she can. I accept that the sponsor's son is financially independent. I accept based on the evidence that the parties do not share joint responsibility for the care and support of children.
20. The evidence of the nature of the household indicates that the parties are in a genuine and continuing relationship, and live together, and not separately and apart, on a permanent basis, at both the time of application and at the time of decision.

21. *The social aspects of the relationship*

22. I have considered the letters from the two doctors at the medical clinic attended by both the applicant and the sponsor dated 3 March 2017 and 19 February 2017. One letter states that based on the doctor's observation he can see that the parties are a very supportive couple, especially during time of illness. The other letter states that based on the observation of the doctor the interactions between the parties looked like they are very supportive of each other and care for each other well especially during times of illness.
23. I have considered the two statutory declarations of the tenants at units in the same block as the applicant and sponsor. Both the statutory declarations named the applicant and sponsor, describe them as husband and wife, and referred to them as their neighbours and that they interact frequently as neighbours. One of the statutory declarations describe the applicant and sponsor as being happy in each other's company and that nearly every day they can be seen taking a walk together.
24. I have also considered the detailed statement of the sponsor's younger brother. I have considered the photographs provided of the parties together, and at family functions. I accept the parties go out with friends, and regularly meet with previous colleagues of the sponsor for meals. I accept the applicant and sponsor invite relatives to meals at their unit, and go to other family members homes for meals on a regular basis.
25. I accept that the parties represent themselves to other people as being married to each other. I accept the opinion of the parties' friends and acquaintances about the nature of their relationship is that it is a genuine, caring and happy marital relationship.
26. The evidence of the social aspects of the relationship indicates that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that they are in a genuine and continuing relationship, both at the time of application and at the time of decision.

27. *The nature of the person's commitment to each other*

28. I accept that the parties met in April 2014. I accept that the parties moved in and commenced living together on 20 March 2015. The duration of the relationship at the time of application is six months. The duration of the relationship at the time of decision is three and a half years. I accept that the length of time the parties have lived together at the time of decision is also three and half years.
29. I have considered the written evidence provided by the doctors and the sponsor's younger brother, and the written submissions by the sponsor and the applicant. I have considered the oral evidence of the parties. I accept that the applicant and sponsor provide support to each other through illness and difficulties. I accept the sponsor was supportive and encouraging when the applicant had difficulty obtaining her driver's license. I have considered the

statutory declarations of the two neighbours, and the oral and written evidence provided by the parties. I accept the applicant and the sponsor provide companionship to each other.

30. I accept the applicant and sponsor both consider their relationship is long-term. I accept the sponsor has committed to moving to China to live with the applicant if the visa is not granted. I accept that the parties wish to take care of each other, and to continue to live together.
31. The evidence of the nature of the parties' commitment to each other indicates that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others and their relationship is genuine and continuing, and they live together, and not separately and apart, on a permanent basis, at both the time of application and at the time of decision.
32. For these reasons I am satisfied that the parties meet the requirements for a spouse relationship within the meaning of s.5F(2)(a)-(d) at both the time of application and at the time of decision.
33. Therefore the applicant meets the requirements of cl.820.211(2)(a) at the time of application.
34. I have considered the application and sponsorship forms. I am satisfied that the sponsor has turned 18 years at the time of application. I am satisfied that the applicant is sponsored by the applicant spouse who has turned 18, and therefore the applicant meets the requirements of cl.820.211(c) at the time of application.
35. There is no evidence before me that the applicant was not the holder of a substantive visa at the time of application, and therefore the requirements of cl.820.211(d) do not apply.
36. As the applicant meets the requirements of cl.820.211(a),(c) and (d), I am satisfied the applicant satisfies the criteria in cl.820.211(2) at the time of application.
37. I am satisfied the applicant continues to meet the requirements of cl.820.211(2), and therefore meets the requirements of cl.820.221 at the time of decision.
38. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
- 39.

DECISION

40. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations.

41.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).